UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARNELL MCGARY, Petitioner, v. HENRY RICHARDS, Respondent.	Case No. C09-5156BHS-KLS REPORT AND RECOMMENDATION Noted for September 11, 2009

Petitioner is in the custody of the Washington State Department of Social and Health Services ("DSHS") at its Special Commitment Center ("SCC") located on McNeil Island, Washington. This matter is before the Court on his petition for writ of *habeas corpus* filed with this Court pursuant to 28 U.S.C. § 2254. (Dkt. #1). Respondent has answered the petition and filed the relevant state court records, and petitioner has filed a reply thereto. Thus, the case is ripe for review and a decision by the Court.

FACTUAL AND PROCEDURAL HISTORY

On February 5, 2004, petitioner stipulated to being civilly committed as a sexually violent predator ("SVP") pursuant to RCW Chapter 17.09 in the Pierce County Superior Court, which determined he was an SVP and ordered him committed to the custody of DSHS. (Dkt. #16, Exhibit 3, p. 5). The Washington State Court of Appeals, Division II, summarized the relevant facts of this case as follows:

> In 1987 and 1988, McGary committed sexual offenses against three different women. Each offense involved forcible entry into the victim's home. In 1988, McGary pleaded guilty to two counts of first degree rape, one count of indecent liberties by forcible compulsion, two counts of first degree burglary, and one count of second degree burglary based on the offenses against the three women. His convictions of rape

and indecent liberties by forcible compulsion are sexually violent offenses under RCW 71.09.020(15).

McGary served approximately nine years in prison. While in prison, McGary committed over 40 major infractions, including numerous threats to staff, and suffered from paranoia and delusions that prison officers were trying to kill him.

. . .

Approximately one week before his scheduled release from prison in April 1998, [DSHS] filed a SVP petition for McGary's civil commitment under chapter 71.09 RCW. After the petition was filed, a psychological examination found that McGary satisfied the legal definition of a sexually violent predator under RCW 71.09.020(16). This examination reviewed police reports of his prior sexual offenses, his prison file, and numerous prior mental health evaluations.

Following the probable cause hearing on [DSHS]'s petition, McGary awaited trial at McNeil Island prison; but his mental condition continued to deteriorate. McGary continuously refused to take psychiatric medication to control his paranoid and schizophrenic behavior. A psychologist and medical doctor employed by WSH [Western State Hospital] evaluated McGary and recommended involuntary commitment under chapter 71.05 RCW so that he could receive treatment for schizophrenia and antisocial personality disorders. Their affidavit in support of involuntary commitment stated that McGary "requires inpatient treatment [and] is unsafe to reside in the community." Their petition under chapter 71.05 RCW stated that because of McGary's mental disorders, he presented "a likelihood of serious harm to others" and "is gravely disabled," thus McGary "requires intensive, supervised, 24 hour restrictive care."

Consequently, in April 2000, [DSHS] dismissed the SVP petition without prejudice and McGary was involuntarily committed under chapter 71.05 RCW to WSH. McGary was detained at WSH from April to December 2000, except for a brief period in July when he was held in the Pierce County Jail because of his dangerous and threatening behavior toward WSH staff.

During his commitment at WSH, McGary spent time in two of WSH's most highly secured wards that housed males only. As an experienced WSH psychologist stated in his declaration, "Mr. McGary's involuntary commitment at Western State Hospital was intensive, supervised, twenty-four hour per day care. . . . his life was structured, regulated, supervised and controlled." For example, except for two months, McGary's ward was accessible only through controlled elevators and was continuously locked, with only WSH staff carrying keys. Consistent with the WSH doctors' orders, at all times during McGary's detention at WSH, the staff continuously supervised his use of the weight room, dining hall, and similar facilities. WSH staff closely supervised a few dances McGary attended. And McGary had access to a smoking pad attached to his locked ward that WSH staff supervised.

McGary was never authorized to leave WSH without a supervised escort. Consequently, WSH staff escorted him on the three occasions when McGary left the WSH grounds: twice when he swam at a nearby swimming pool and once when he registered as a sex offender at the sheriff's office. McGary's declaration describing his WSH commitment is consistent with all of the foregoing facts.

WSH forcibly medicated McGary to control his delusions. In September 2000, WSH doctors petitioned for an additional three months of involuntary detention at WSH because he remained "gravely disabled, [and] a potential danger to others." The WSH doctors' affidavit stated that McGary remained "[p]aranoid" and "delusional," partly because he "continues to believe that he was made psychotic through systematic brainwashing at the prison system. [McGary] stated that he views himself primarily as having been a robber who was feeding his drug habit and stole some sex along the way."

Eventually McGary's mental condition stabilized; but WSH doctors continued to believe that McGary satisfied the definition of a sexually violent predator. Consequently, on December 15, 2000, [DSHS] again filed a SVP petition while he was

> detained at WSH. The petition recited his prior rape and indecent liberties convictions and asserted that McGary's mental disorders included Paraphilia Not Otherwise Specified (Rape) and an antisocial personality disorder. [DSHS]'s petition did not allege a recent overt act.
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> After filing the SVP petition, [DSHS] dismissed McGary's involuntary civil commitment under chapter 71.05 RCW and he was transferred back to McNeil Island prison for the pending SVP proceedings. Less than a week later, McGary stipulated to a finding of probable cause that he was a sexually violent predator. He remained at McNeil Island while awaiting trial on the SVP petition.
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> . . .
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> In September 2001, McGary filed motions to dismiss [DSHS]'s SVP petition, arguing that because his detention at WSH was not total confinement, [DSHS]'s petition improperly failed to allege a recent overt act and that the petition violated his 1988 plea agreement regarding his prior sexual offenses. The trial court denied McGary's motions.
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> In January 2004, approximately one week before trial on [DSHS]'s SVP petition, McGary renewed his argument that the petition was fatally flawed because it did not allege a recent overt act based on our Supreme Court's discussion of total confinement in *In re Detention of Albrecht*, 147 Wn.2d 1, 10, 51 P.3d 73 (2002). The trial court again denied McGary's motion, concluding that [DSHS] was not required to allege a recent overt act because McGary's WSH detention was total confinement given the differing degrees of supervision in typical prison settings and chapter 71.09 RCW's legislative intent.
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> After the trial began, but before the jury was seated, McGary stipulated to civil commitment under chapter 71.09 RCW. He stipulated that he suffers from schizophrenia, an antisocial personality disorder, that "cause[] him serious difficulty controlling his sexually violent behavior" and that he was "more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility." The stipulation allowed McGary to be placed into a less restrictive alternative (LRA) on McNeil Island.

(Id., Exhibit 9, pp. 1-6 (internal footnotes and citations omitted)).

On January 5, 2005, petitioner – whose civil commitment stipulation reserved for him the right to appeal two motions to dismiss he had filed, and which the trial court had denied – filed through counsel an appeal of those motions with the Washington State Court of Appeals, Division II. (Id., Exhibit 3, p. 6, Exhibit 6, p. 12). That appeal raised the following issues: (1) the trial court erred in denying petitioner's motions to dismiss the state's petition for failure to allege and prove a recent overt act; (2) petitioner was not in total confinement while at WSH, and the trial court erred by denying his motion to dismiss, which relieved the government of its obligation to plead and prove that he committed a recent overt act after his release from custody; and (3) the trial court erred by denying petitioner's motion to dismiss due to failure to comply with the 1988 plea agreement, (a) by filing the RCW 71.09 petitions in 1998 and 2000, and (b) because the plea agreement constituted an enforceable contract. (Id., Exhibit 6, pp. ii-iii). In the reply to the state's response petitioner's counsel filed, only the issue as to whether petitioner's placement in WSH was confinement in a "secure facility," thereby requiring the state to plead and prove that he committed a recent overt act, was presented. (Id., Exhibit 8, p. ii).

On July 19, 2005, the Washington State Court of Appeals, Division II, affirmed the trial court's denial of petitioner's motions to dismiss. (Id., Exhibit 9). On August 8, 2005, petitioner's counsel filed a motion for reconsideration of the court of appeals's decision, again raising the issue of whether petitioner was being held in total confinement while at WSH, thus requiring the state to plead and prove a recent overt act. (Id., Exhibit 10, p. 8). The court of appeals denied the motion on August 18, 2005. (Id., Exhibit 11). On September 13, 2005, petitioner's counsel filed a petition for review with the Washington State Supreme Court – once more arguing that because petitioner was not held in total confinement while at WSH, the state was required to plead and prove a recent overt act – which was denied on April 4, 2006. (Id., Exhibit 12, p. ii, Exhibit 14).

On April 12, 2006, the Washington State Court of Appeals, Division II, issued its mandate, stating that its July 19, 2005 decision became the decision terminating review on April 4, 2006. (Id., Exhibit 17). On April 21, 2006, a motion for reconsideration of the Washington State Supreme Court's denial of the petition for review was filed by petitioner's counsel, and on April 24, 2006, the supreme court's Deputy Clerk notified petitioner's counsel that no action would be taken on the motion, since petitions for review were not subject to reconsideration. (Id., Exhibits 15-16). On August 29, 2006, petitioner, this time acting *pro se*, filed a petition for writ of *habeas corpus* with the Pierce County Superior Court, which presented the following issues for consideration:

> (1) Is the custody at [WSH], atypical from confinement at the [SCC].
> (2) Is Petitioner a unitruded [sic] free person under RCW 71.09.040 after his petition was dismissed and he voluntary [sic] went to [WSH] that a Recent Overt Act would be required.
> (3) Is RCW 71.09.060(3) by law mandatory language, and contrary to In re Detention of McGary, 128 Wn.2d (2005).
> (4) Is In re Detention of Gordon, 102 Wn.2d (2000) and the recent decision of In re Detention of Anderson, No. 31915-2-II contrary to In re Detention of McGary, 128 Wn.2d (2005) and RCW 71.09.060(3).
> (5) Is there a genuine opportunity to offend while confined at [WSH] and is there [sic] population unique and more informal.

(Id., Exhibit 18, p. 3). In addition, the petition also alleged the United States Constitution's Due Process Clause required the state to release him from civil commitment, because there was no overt act and he was not in a secure facility at WSH. (Id., pp. 1-2, 14). On November 29, 2006, the trial court transferred the petition to the Washington State Court of Appeals, Division II, which dismissed the petition on

October 17, 2007. (Id., Exhibits 19, 21).

On October 30, 2007, petitioner, again acting *pro se*, filed a motion for discretionary review of the court of appeals's dismissal of his petition for review with the Washington State Supreme Court, in which the following issues were raised: (a) whether petitioner was incarcerated for an act that caused harm of a sexually violent nature or for an act that qualifies as a recent overt act; (b) whether he was incarcerated at WSH, and therefore whether the state was required to plead and prove a recent overt act; and (c) whether absent a showing of a recent overt act or sexually violent offense, the state may not file an SVP petition. (Id., Exhibit 22, pp. 4-6). Petitioner also listed in his motion the same issues noted above that he raised in the state *habeas corpus* petition he filed. (Id.). On April 10, 2008, the Washington State Supreme Court Commissioner issued a ruling denying petitioner's motion. (Id., Exhibit 24). On April 17, 2008, petitioner filed a motion to modify the Commissioner's ruling, which addressed essentially the same issues as he did in his motion for discretionary review. (Id., Exhibit 25).

The Washington State Supreme Court denied petitioner's motion to modify the Commissioner's ruling denying review on June 4, 2008, and on June 10, 2008, the Washington State Court of Appeals, Division II, issued its certificate of finality, certifying that its October 17, 2007 decision became final on June 4, 2008. (Id., Exhibits 26-27). On June 14, 2008, petitioner filed a second personal restraint petition with the Washington State Court of Appeals, Division II, in which he argued that RCW Chapter 71.09 in general – as well as the state's application of that law in this case – is unconstitutional in that it implicates the due process, double jeopardy and *ex post facto* clauses of the United States Constitution, and is based on predicate offenses. (Id., Exhibit 28). Petitioner also asserted in that petition an ineffective assistance of counsel claim. (Id.).

The court of appeals dismissed this second petition on October 16, 2008, because it was filed more than one year after the court issued its mandate, and thus was time-barred. (Id., Exhibit 29). On October 31, 2008, petitioner filed a motion for discretionary review of that dismissal with the Washington State Supreme Court, presenting again the due process, double jeopardy, *ex post facto*, and predicate offenses issues he raised in his second personal restraint petition. (Id., Exhibit 30). The Washington State Supreme Court Commissioner issued a ruling denying review of petitioner's motion on December 31, 2008, based on the same reasons as did the court of appeals. (Id., Exhibit 31).

On March 13, 2009, the Washington State Court of Appeals, Division II, issued its certificate of finality, stating its October 16, 2008 decision became final on February 2, 2009. (Id., Exhibit 32). On March 18, 2009,[1] petitioner filed his petition for federal *habeas corpus* relief with this Court, challenging the legality of his civil commitment based on the following grounds:

> GROUND ONE: Petitioner claims Double Jeopardy after the State filed two petitions, the latter being after I was dismissed and released to WSH . . . Petitioner was at [WSH], a none [sic] total confinement facility, when the second petition was filed. And had registered, had community outing, and was on a [sic] unsecure [sic] ground, were [sic] he could rome [sic] without security devices such as GPS system. Further, the facility was co-ed, and Petitioner had unsupervised contact with female patients when the state filed it's [sic] second petition it did so unlawful [sic], and against RCW 71.09.060(3).
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> GROUND TWO: The states [sic] petition is based on predicate offenses, and the Ninth Circuit has denounced the use of predicate offenses . . . The Ninth Circuit ruled that if the petition is based on predicate offenses it must resolve the issue.
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> GROUND THREE: Ineffective Assistance of Counsel . . . The underlying petition is defective, probable cause information supports, erroneous information, leading experts say APD is not enough to sustain commitment.
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> GROUND FOUR: The state continues to confine Petitioner unlawfully as total confinement relies on whether or not your [sic] in a secure facility . . . The State Supreme Court decided that in order for a petition to be filed the person has to be in total confinement serving time for a sex offense[.] RCW 71.09.025, 71.09.030.

(Dkt. #1, pp. 6-7, 9-10[2]). Respondent has filed his answer to the petition, along with the relevant state court record, and petitioner has filed a reply thereto. (Dkt. #15-#16, #19). Accordingly, the petition is now ripe for the Court's review.

There appears to be no issue of timeliness concerning the filing of petitioner's federal *habeas corpus* petition with this Court. While there are issues with respect to the exhaustion of state remedies concerning grounds one through three above, as explained below, it appears the state's highest court now would find those grounds to be procedurally barred. Therefore, after carefully reviewing the petition, respondent's answer, petitioner's reply thereto, and the remaining record, the undersigned recommends that the Court deny the petition for the reasons set forth below.

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[1] Although the petition was date stamped March 20, 2009, by the Clerk, it apparently was placed by petitioner in the SCC's mailing system on March 18, 2009. (Dkt. #1). See Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002) ("[F]ederal and state habeas petitions are deemed filed when the pro se prisoner delivers them to prison authorities for forwarding to the Clerk of the Court."). Accordingly, March 18, 2008, shall be treated as the date he filed it with this Court.

[2] These are actually the fifth, sixth, eighth, and ninth pages of the petition. However, they are numbered "Page 6," "Page 7," "Page 9," and "Page 10" respectively at the top of those pages. For the sake of clarity and consistency, the Court has used the page numbers that appear on the pages of petitioner's petition in its citations.

NO EVIDENTIARY HEARING IS REQUIRED

In a proceeding instituted by the filing of a federal *habeas corpus* petition by a person in custody pursuant to a judgment of a state court, the "determination of a factual issue" made by that court "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Under 28 U.S.C. § 2254(e)(1), the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." Id.

Where a petitioner "has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court," an evidentiary hearing in federal court will not be precluded. Baja v. Ducharme, 187 F.3d 1075, 1078-79 (9th Cir. 1999) (quoting Cardwell v. Greene, 152 F.3d 331, 337 (4th Cir. 1998)). On the other hand, if the petitioner fails to develop "the factual basis of a claim" in the state court proceedings, an evidentiary hearing on that claim shall not be held, unless the petitioner shows:

> (A) the claim relies on--
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> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense

28 U.S.C. § 2254(e)(2).

An evidentiary hearing "is required when the petitioner's allegations, if proven, would establish the right to relief." Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). It "is *not* required on issues that can be resolved by reference to the state court record." Id. (emphasis in original). As the Ninth Circuit has stated, "[i]t is axiomatic that when issues can be resolved with reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." Id.; United States v. Birtle, 792 F.2d 846, 849 (9th Cir. 1986) (evidentiary hearing not required if motion, files and records of case conclusively show petitioner is entitled to no relief) (quoting 28 U.S.C. § 2255).

Here, "[t]here is no indication from the arguments presented" by petitioner "that an evidentiary hearing would in any way shed new light on the" grounds for federal *habeas corpus* relief raised in his petition. Totten, 137 F.2d at 1177. Because, as discussed below, the issues raised by petitioner may be resolved based solely on the state court record and he has failed to prove his allegation of constitutional errors, no evidentiary hearing is required.

DISCUSSION

I. Standard of Review

A federal petition for writ of *habeas corpus* filed on behalf of a person in custody pursuant to a judgment of a state court:

> [S]hall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Thus, 28 U.S.C. § 2254(d) "defines two categories of cases" where such relief may be obtained. Williams v. Taylor, 529 U.S. 362, 404 (2000).

Under 28 U.S.C. § 2254(d)(1), a state court decision is "contrary to" the Supreme Court's "clearly established precedent if the state court applies a rule that contradicts the governing law set forth" in the Supreme Court's cases. Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (quoting Williams, 529 U.S. at 405-06). A state court decision also is contrary to the Supreme Court's clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, "and nevertheless arrives at a result different from" that precedent. Id.

A state court decision can involve an "unreasonable application" of the Supreme Court's clearly established precedent in the following two ways: (1) the state court "identifies the correct governing legal rule" from the Supreme Court's cases, "but unreasonably applies it to the facts" of the petitioner's case; or (2) the state court "unreasonably extends a legal principle" from the Supreme Court's precedent "to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407. However, "[t]he 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." Lockyer, 538 U.S. at 75. That is, "[t]he state court's application of clearly established law must be objectively unreasonable." Id.

Under 28 U.S.C. § 2254(d)(2), a federal petition for writ of *habeas corpus* also may be granted "if a material factual finding of the state court reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Juan H. V. Allen, 408 F.3d 1262, 1270 n.8 (9th Cir. 2005) (quoting 28 U.S.C. § 2254(d)(2)). As noted above, however, "[a] determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

II. Scope of Review and Harmless Error

The district court may not "reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Thus, the Court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 68; see also Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."). In addition, for federal *habeas corpus* relief to be granted, the constitutional error must have had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted). In other words, a petitioner is "not entitled to habeas relief based on trial error," unless he or she "can establish that it resulted in 'actual prejudice.'" Id.

III. Petitioner's Failure to Exhaust Grounds One Through Three

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of *habeas corpus*. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent. 28 U.S.C. § 2254(b)(3). A waiver of exhaustion, thus may not be implied or inferred. A petition can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). Full and fair presentation of claims to the state court requires "full factual development" of the claims in that forum. Kenney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992).

It is not enough that all of the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state law claim was made. Duncan v. Henry, 513 U.S. 364, 366 (1995) (citing Picard v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459 U.S. 4 (1982)). A federal claim is "fairly and fully" presented to the state courts if the claim is presented "(1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." Insyxiengmay v. Morgan, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations omitted). The petitioner "must alert the state courts to the fact that he is asserting a federal claim in order to fairly and fully present the legal basis of the claim." Id.

The claim must be fairly presented in "each appropriate state court," that is, at each level of state review, so as to alert the state "to the federal nature of the claim," and to give it the "opportunity to pass upon and correct" alleged violations of the petitioner's federal rights. Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citations and internal quotation marks omitted); see also Ortberg v. Moody, 961 F.2d 135, 138 (9th Cir. 1992). The federal basis of the claim, furthermore, must be made "explicit" in the state appeal or petition, "either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law." Insyxiengmay, 403 F.3d at 668; Baldwin, 541 U.S. at 33.

Respondent argues and the undersigned agrees that petitioner has failed to exhaust his state court remedies with respect to grounds one through three of his federal *habeas corpus* petition, by not fully and fairly presenting those claims at each level of state court review. As noted above, the only claims made by petitioner's counsel in petitioner's direct appeal concern state legal challenges. In his state *habeas corpus* petition, petitioner does allege his federal due process rights were violated, because he was not in total confinement at WSH and there was no overt act.[3] (Dkt. #16, Exhibit 18, pp. 1-2, 14). That issue of federal law, however, was not presented to the Washington State Supreme Court. See (Dkt. #22, #25[4]). It also is not clear petitioner properly has raised a due process violation in his federal *habeas corpus* petition, as he only referred to that claim in the brief he submitted in support of his actual petition. See (Dkt. #1-#2). In any event, his failure to properly present it to the state's highest court precludes exhaustion.

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[3]The Washington State Court of Appeals did not address this issue in its decision dismissing petitioner's petition, but rather dismissed the petition on the basis that his argument that he was not in total confinement under state law previously had been raised in his direct appeal, and thus that argument would not be reconsidered, unless he could demonstrate that relitigation thereof would be in the interests of justice, which he had not done. (Id., Exhibit 21). The question of whether the federal *habeas corpus* exhaustion requirement has been satisfied, however, does not turn on whether a state court in its opinion has chosen to ignore a claim that is "squarely raised" in the petitioner's brief. Smith v. Digmon, 434 U.S. 332, 333 (1978).

[4]Petitioner does make one reference to the term "due process" in his motion to modify the Commissioner's ruling denying his petition for review he filed with the Washington State Supreme Court. (Dkt. #25, p. 5). That reference, however, was made only in the context of petitioner's discussion of state statutory and case law, and no indication of an intent to raise a federal constitutional issue can be read into that language. Mere "general appeals to broad constitutional principals, such as due process, equal protection, and the right to a fair trial," furthermore, is "insufficient to establish exhaustion." Hivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing Gray v. Netherland, 518 U.S. 152, 162-63 (1996)). In addition, to the extent he did so here, a petitioner may not rely on claims he or she makes in his or her state court of appeals briefing, "to satisfy the procedural requirements for the [full and fair] presentation" of those claims to the state's highest court. Kibler v. Walters, 220 F.3d 1151, 1152-53 (9th Cir. 2000).

As noted above, in his second personal restraint petition, petitioner argued RCW Chapter 71.09 in general – as well as the state's application of that law in this case – is unconstitutional in that it implicates the due process, double jeopardy and *ex post facto* clauses of the United States Constitution, and is based on "predicate offenses." (Id., Exhibit 28). Also as noted above, however, the Washington State Court of Appeals dismissed petitioner's petition, because it was filed more than one year after the court of appeals had issued its mandate regarding the denial of his direct appeal. (Id., Exhibit 29). A *habeas corpus* claim is barred from federal review if the petitioner failed to exhaust state remedies and the state's highest court would now find the claim procedurally barred. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); see also Boyd v. Thompson, 147 F.3d 1124, 1126 (9th Cir. 1998) (review barred when state court declines to address federal claims because prisoner failed to meet state procedural requirement).

To give litigants "a fair opportunity to comply with known procedural rules, the controlling state procedural bar is the one in place at the time the claim should have been raised." Calderon v. U.S. District Court for the Eastern District of California, 103 F.3d 72, 75 (9th Cir. 1996). Thus, "[o]nly if the bar is 'firmly established and regularly followed' at that time will it serve as an adequate ground to foreclose federal review." Id. Since 1989, Washington has had a one-year period of limitation within which a conviction or sentence may be collaterally attacked:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1). This is the basis on which the Washington State Court of Appeals and Washington State Supreme Court found petitioner's second personal restraint petition to be time barred. See (Dkt. #16, Exhibits 29, 31). Nor, also as found by those courts, do any of the six statutory exceptions to the above time limit apply here. See id.; see also RCW 10.73.100. Accordingly, federal *habeas corpus* review of the claims petitioner raised therein are barred in this case as well.

IV. Petitioner's Fourth Ground Concerns Only State Law Claims

In his fourth ground for federal *habeas corpus* relief petitioner, as noted above, claims:

> The state continues to confine Petitioner unlawfully as total confinement relies on whether or not your [sic] in a secure facility . . . The State Supreme Court decided that in order for a petition to be filed the person has to be in total confinement serving time for a sex offense[.] RCW 71.09.025, 71.09.090.

(Dkt. #1, p. 10). Clearly, though, petitioner has only asserted state law claims here. Also as noted above, the Court may not "reexamine state-court determinations on state-law questions." Estelle, 502 U.S. at 67-68. The Court, therefore, "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 68; see also Smith, 455 U.S. at 221 (federal courts may intervene only to correct wrongs of constitutional dimension).

Federal courts, furthermore, cannot "presume . . . a state court failed to apply its own law." Bell v. Cone, 543 U.S. 447, 455 (2005) ("§ 2254(d) dictates a 'highly deferential standard for evaluating state-court rulings,' . . . which demands that state-court decisions be given the benefit of the doubt.'") (quoting Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)); see also Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (federal court is not to disregard intermediate appellate state court decision resting upon rule of state law which it announces, unless federal court is convinced by other persuasive data that highest court of state would decide otherwise). Thus, "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." Bradshaw v. Richey, 546 U.S. 74, 76 (2005). Because he asserts only state law claims in his fourth ground for *habeas corpus* relief, and because there is nothing in the record to convince the Court that the state's courts would decide those claims any differently than they already have, they are not subject to federal *habeas corpus* review.

CONCLUSION

For the reasons set forth above, petitioner has failed to show that he is entitled to federal *habeas corpus* relief. Accordingly, the Court should deny petitioner's petition.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have ten (10) days from service of this Report and Recommendation to file written objections thereto. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set this matter for consideration on **September 11, 2009**, as noted in the caption.

DATED this 19th day of August, 2009.

Karen L. Strombom
United States Magistrate Judge